No. 88-309

Supreme Court, U.S.
FILED
MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF WYOMING,
Petitioner,

v.

UNITED STATES OF AMERICA, SHOSHONE TRIBE AND NORTHERN ARAPAHO TRIBE OF THE WIND RIVER INDIAN RESERVATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WYOMING

BRIEF OF THE CITY OF PHOENIX AS AMICUS CURIAE IN SUPPORT OF THE STATE OF WYOMING

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March 9, 1989

QUESTION PRESENTED

Whether the present and future water needs of the Shoshone Tribe and Northern Arapaho Tribe of the Wind River Indian Reservation are to be measured (1) by the Reservation's practicably irrigable acreage; (2) by the Reservation's practicably irrigable acreage modified by proof of tribal necessity; or (3) as Congress has mandated, by the amount of water actually put to use on Reservation lands?

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The City of Phoenix, a political subdivision of the State of Arizona, through its city attorney, files this brief amicus curiae in accordance with Rule 36 of the Court.

INTEREST OF THE AMICUS CURIAE

The City of Phoenix, a political subdivision of the State of Arizona, is party to a general stream adjudication pending in the Superior Court for Maricopa County in the State of Arizona. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source,*

Nos. W-1, W-2, W-3 and W-4, Superior Court in and for Maricopa County, Arizona, hereinafter the "Gila River Stream Adjudication." The municipal, industrial and domestic water supplied by the City to its nearly one million inhabitants is in large part diverted from rivers subject to that Adjudication.

Indian tribes appearing in the Gila River Stream Adjudication, either on their own behalf or through the United States as their trustee, have claimed substantial federal reserved water rights. These rights are claimed for the San Carlos Apache Tribe, the Gila River Indian Community, the Tonto Apache Tribe, the Yavapai-Prescott Indian Community, the Salt River Pima-Maricopa Indian Community, the Fort McDowell Indian Community, the Camp Verde Yavapai-Apache Community, the White Mountain Apache Tribe and other tribes. The jurisdiction of the state court over these claims was largely confirmed in *Arizona v. San Carlos Apache Tribe of Arizona,* 463 U.S. 545 (1983).

The type of analysis used by the state court in Arizona to quantify the very substantial tribal claims to reserved water rights could have an enormous impact upon the rights of the City of Phoenix, and the approximately 22,000 other claimants who have filed nearly 65,000 separate claims to water in the Gila River Stream Adjudication.

This Court's review of the decision of the Supreme Court of Wyoming in the current proceeding may determine whether the quantification standard of practicably irrigable acreage is to be rigidly applied to tribal claims in the Gila River Stream Adjudication or considered in light of applicable Congressional acts and the individual circumstances of the particular tribes whose rights are there at issue.

SUMMARY OF ARGUMENT

In *Arizona v. California,* 373 U.S. 546 (1963) this Court held that a water right was reserved by implication for the present and future needs of the Indians who were to occupy certain federal lands along the Colorado River. With no indication from Congress as to the measure of the implied reservation of rights, this Court turned to and accepted the practicably irrigable acreage standard developed by the special master in those proceedings. *Arizona v. California, supra* at 600.

The measure of the water rights reserved for the Shoshone and Northern Arapaho Tribes occupying the Wind River Indian Reservation is, by contrast, specified in federal legislation. With the Act of March 3, 1905, 33 Stat. 1016, hereinafter "1905 Act," ratifying the Second McLaughlin Agreement, Congress exercised its plenary power over Indian affairs to require that the Reservation's reserved water rights be quantified in accordance with the laws of the State of Wyoming.

Wyoming, a prior appropriation state, measures a water right by actual beneficial use, not practicably irrigable acreage. Wyo. Const. art. VIII, § 3. The Shoshone and Northern Arapaho federal reserved rights should therefore be quantified as the amount of water the tribes put to actual beneficial use on the Wind River Indian Reservation under the laws of the State of Wyoming. Congress determined with the 1905 Act that such an amount, to be established by the diligence and interest of the tribes and their federal trustee, would satisfy the purpose for which the land was reserved.

ARGUMENT

The Wind River Indian Reservation was established by the Second Treaty of Fort Bridger, signed in 1868, ratified and proclaimed the following year. Treaty with the Eastern Band Shoshone and Bannock, 15 Stat. 673 (1868), hereinafter "the 1868 Treaty." Under the analysis employed by

this Court in *Winters v. United States*, 207 U.S. 564 (1908) and again in *Arizona v. California, supra at 600*, the 1868 Treaty implicitly reserved water rights for the Indians who would occupy such lands, with any such reservation of rights effective as of the date of the 1868 Treaty for the Wind River Indian Reservation lands which continued to be held in trust status.

With the 1868 Treaty completely silent on the subject of reserved water rights for the Indians who would occupy the Wind River Indian Reservation, any such rights remained inchoate until an adjudication or Act of Congress could provide a means to quantify, prioritize or otherwise determine their attributes. The inchoate nature of any federal reserved rights is apparent from the special master's decision in the Wyoming proceedings to quantify reserved rights by calculating practicably irrigable acreage based on technology available *at the time of the adjudication* and not as of the date of the reservation of the lands there at issue. Pet. App. H at 535a.

Thus, if there is a determination by this Court that the Indians of the Wind River Indian Reservation had water reserved for their use by the 1868 Treaty, there must also be a determination as to the manner in which these inchoate rights are to take form.

In *Arizona v. California, supra,* with no express direction from Congress as to the attributes of the water impliedly reserved, this Court accepted the practicably irrigable acreage standard devised by Simon H. Rifkind, special master in *Arizona v. California, supra,* as a means to quantify the amount of water reserved for the present and future needs of the five tribes whose rights were there at issue.

Congress left no similar void with respect to the means by which the water rights reserved for the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation might be quantified. The 1905 Act ratifying

the Second McLaughlin Agreement directs the tribes to secure their rights under state law. The quantity of water the tribes might claim for the Wind River Indian Reservation is to be measured not by practicably irrigable acreage but rather by the rights secured under the laws of the State of Wyoming:

> [Certain federal funds] shall be devoted to surveying, platting, making of maps, payment of the fees, *and the performance of such acts as are required by the statutes of the State of Wyoming in securing water rights from said State for the irrigation of such lands as shall remain the property of said Indians,* whether located within the territory intended to be ceded by this agreement or within the diminished reserve.

1905 Act, Article III, 33 Stat. 1017. (Emphasis supplied.)

Wyoming law then and now follows the doctrine of prior appropriation: to secure a right to water, previously unappropriated water must be put to actual beneficial use, with the extent of the right equal to the amount put to such use. Wyo. Const. art. VIII, § 3. Thus, in 1905, Congress determined that the amount of water necessary for the Wind River Indian Reservation to accomplish its intended purpose was that amount of water which the Shoshone and Northern Arapaho Tribes and their federal trustee might put to actual beneficial use on Reservation lands under the laws of the State of Wyoming.

The 1905 Act provided an incentive for the tribes and for the predecessor of the Bureau of Indian Affairs to put water to immediate and continuous use on reservation lands. The water rights of future generations were to be measured by the diligence of present generations, acting under the tutelage and with the financial support of the federal trustee. Use it or lose it, not practicably irrigable acreage, was the Congressionally-mandated standard for

the quantification of water rights for the Indians occupying the Wind River Indian Reservation.

This Court need not weigh practicably irrigable acreage against Wyoming's prior appropriation standard of actual beneficial use or against some other necessity-based quantification standard to see which is the "best" standard for the quantification of the Shoshone and Northern Arapaho water rights. Congress spoke, over 80 years ago, to direct the quantification of such rights under the laws of the State of Wyoming. The plenary power of Congress over Indian affairs and tribal trust lands has long been recognized by this Court. *Shoshone Tribe v. United States,* 299 U.S. 476 (1937). ("Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty." 299 U.S. at 497.)

With the 1905 Act, Congress determined the means to quantify any water rights reserved by the 1868 Treaty for the Indians occupying the Wind River Indian Reservation. Practicably irrigable acreage, devised for five tribes by Simon Rifkind in the absence of any Congressional directive, cannot displace the quantification standard enunciated by Congress in 1905. The water rights of the Shoshone and Northern Arapaho Tribes of the Wind River Indian Reservation are to be quantified under the laws of the State of Wyoming. Prior appropriation and actual beneficial use, not practicably irrigable acreage, measure the right.

The practicably irrigable acreage standard of *Arizona v. California, supra,* was expressed in terms of land, but the purpose for the reservation of rights implied by this Court was to provide for the present and future needs of people. The preservation of rights for future generations need not only be by a means so passive as to award "X" amount of water to "X" amount of acres. As Special Master Tuttle observed in his report filed in *Arizona v. California,* 460 U.S. 605 (1983), this Court "did not necessarily adopt [the practicably irrigable acreage] standard as the universal

measure of Indian reserved water rights . . . ." *Report, Elbert P. Tuttle, Special Master,* February 22, 1982 at 90. (Footnote omitted.)

Congress in 1905 placed its faith in a partnership of federal and tribal efforts to develop the lands of the Wind River Indian Reservation. The approach chosen by Congress in 1905 strongly encouraged Indian self-determination with only those waters actually put to beneficial use by the Shoshone and Northern Arapaho Tribes reserved for the benefit of their future generations. The Congressional approach met with considerable success. The Supreme Court of Wyoming observed in the Big Horn proceedings that "during the period 1905–1908, the United States obtained state water permits for some 145,000 acres of Indian lands on the Wind River Indian Reservation . . . ." Pet. App. A at 23a.

A specific Congressional directive for the quantification of Shoshone and Northern Arapaho water rights, *not* a 1963 judicial standard of quantification developed without benefit of Congressional guidance, should determine the amount of water to be awarded the Indians of the Wind River Indian Reservation.

CONCLUSION

This Court selected practicably irrigable acreage as a means to quantify Indian water rights in *Arizona v. California,* 373 U.S. 546 (1963), in an effort to ensure that the present and future needs of five tribes along the Colorado River would be met.

Congress, in 1868, may have had a similar goal to provide for the present and future needs of the Indians of the Wind River Indian Reservation but, in 1905, chose an alternate and equally valid approach to the quantification of Indian water rights. The amount of water reserved to the Shoshone and Northern Arapaho would be determined by the interest, initiative and ability of the tribes and their

federal trustee to put water to good use under the laws of the State of Wyoming. Actual use, not practicably irrigable acreage, was the Congressionally-mandated quantification standard for the water rights of the Shoshone and Northern Arapaho Tribes occupying the Wind River Indian Reservation.

For all of the foregoing reasons, the decision of the Supreme Court of Wyoming requiring the use of the practicably irrigable acreage standard should be reversed.

Respectfully Submitted,

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